No. 88-1607

(3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CLARK COUNTY, NEVADA,

Petitioner,

—v.—

FRANK BRISCOE COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Rule 28.1 Listing

There are no parents, subsidiaries (except wholly owned subsidiaries) or affiliates of respondent Frank Briscoe Company, Inc.

TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
A. The Warranty Issue	3
B. Notice of Claim Statute	4
C. Fair Trial	6
CONCLUSION	7

TABLE OF AUTHORITIES

Cases PAGE

Aiken County v. BSP Dev. of Envirotech Corp., 866 F.2d 661 (4th Cir. 1989) 4

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 4

Felder v. Casey, 108 S.Ct. 2302 (1988) 6

Hart v. City of Las Vegas, 73 Nev. 29, 307 P.2d 617 (1957) 4

Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) 5

Lincoln County v. Luning, 133 U.S. 529 (1890) 5

NLRB v. Hendricks County Rural Elective Membership Corp., 454 U.S. 170, 176 n.8 (1981) 4

State v. Capital Convalescent Center, 92 Nev. 147, 547 P.2d 677 (1976) 5

Swift v. Tyson, 16 Pet. 1 (U.S. 1842) 4

United States v. Johnston, 268 U.S. 220 (1925) 4, 6

United States v. Spearin, 248 U.S. 132 (1918) 3

Volt Information Sciences Inc. v. Board of Trustees of Leland Stanford University, 109 S.Ct. ____, (1989) .. 4

Welch v. Texas Dept. of Highways and Pub. Transp., ____ U.S. ____ (1987), 107 S.Ct. 2941 5

Statutes and Rules

Rule 17.1 of the Rules of the Supreme Court 2

PAGE

Other Authorities

Stern, Gressman and Shapiro, Supreme Court Practice (6th ed. 1988) 2

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The petition in this diversity case presents nothing more than the reargument of two issues of Nevada law that were fully considered by the Court of Appeals.

COUNTER-STATEMENT OF THE CASE

This petition arose out of a contract dispute between the parties over the construction of an advanced waste water treatment plant. In May of 1980, during construction, respondent Briscoe, the general contractor, brought a diversity suit against petitioner Clark County seeking declaratory and equitable relief, but not damages, in order to enforce its understanding of the contract. The County counterclaimed for damages alleging breach of contract. Thereupon, Briscoe timely filed its compulsory counterclaim-in-reply against the County for breach of

contract damages. (A. pp. 5a, 10a) Ultimately, after the completion of construction in April of 1982, Briscoe amended its complaint. (A. p. 6a) In *Frank Briscoe Co. v. County of Clark*, 643 F. Supp. 93 (D. Nev. 1986), the District Court dismissed much of the amended complaint. After a trial of 87 days, 2,200 exhibits, and 19 expert witnesses, the District Court granted a partial directed verdict for the County. (A. p. 6a) The District Court submitted to the jury thirteen claims from a single count in Briscoe's amended complaint. That submission was accompanied by ten special interrogatories, which required the jury to determine specifically whether the County had breached its contract. The jury returned findings for Briscoe on eight of the ten interrogatories, and it determined that the County was responsible in damages for 612 out of 667 days of delay. After Briscoe accepted a small remittitur, the District Court entered judgment for Briscoe, and the County appealed to the Ninth Circuit. (A. pp. 6a-7a) After fully considering the County's claims on the merits, the Ninth Circuit affirmed. *Frank Briscoe Company, Inc. v. Clark County*, 857 F.2d 606 (1988). (A. p. 2a) This petition followed.

REASONS FOR DENYING THE WRIT

This petition presents no question appropriate for this Court's action. The County argues that the jury instructions erroneously imposed certain warranty responsibilities on the County, and that Briscoe's entire claim for damages was barred *in limine* because Briscoe failed to comply with a Nevada notice-of-claim statute. The Court of Appeals rejected both contentions on the merits, and neither of its holdings involves anything other than a question of Nevada law. Misconstruction of state law by a court of appeals in a diversity case is not a ground for certiorari. See Rule 17.1 of the Rules of the Supreme Court; Stern, Gressman and Shapiro, *Supreme Court Practice*, § 4.10, p. 212 (6th ed. 1988). Petitioner's final contention (pp. 15-20) that a trial continuance and evidentiary rulings resulted in a denial of a fair trial is frivolous, and its completely fact-specific character presents no issue for this Court.

A. The Warranty Issue

The County's petition (p. 6) contends that the Ninth Circuit's holding imposes warranty liabilities on the County "drastically shifts the allocation of risks between governmental entities and contractors in construction law," that if followed the Ninth Circuit's holding "could have a staggering budgetary impact on the United States, each state . . ." and that it is in conflict "with an often-cited landmark decision of the Court of Claims."

These assertions are meritless. It is helpful to begin with what the Ninth Circuit actually did. After careful review, the Ninth Circuit concluded that the jury in this case had been properly instructed:

> The County does not question the continuing vitality of the *Spearin* doctrine [*United States v. Spearin*, 248 U.S. 132 (1918)];, but argues that the court in this case imposed an independent warranty of completion by a particular date on the County irrespective of whether it supplied faulty specifications. This is simply incorrect. None of the special interrogatories submitted to the jury can be read to impose liability for work delays absent specific acts or omissions by the County causing the delay. We reject the notion that the County was subject to "strict" liability for delays in the plant's completion.
>
> The court's instruction correctly stated the law and directly related to an issue in the case . . . .

(857 F.2d at 612; A. p. 14a) The County's effort to inflate this holding about the adequacy of a particular set of jury instructions into a plain and direct conflict between the Ninth Circuit and the Claims Court defies credulity. The legal principles urged by the County (e.g., no strict liability) were expressly adopted by the Ninth Circuit. (857 F.2d at 611-12; A. pp. 12a-14a) Quite plainly, whether a particular set of jury instructions in one case adequately conveyed those otherwise acknowledged and settled legal principles is an entirely fact-specific issue and presents no question for this Court. This Court "does not grant

certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *NLRB v. Hendricks County Rural Elective Membership Corp.*, 454 U.S. 170, 176 n.8 (1981).

The County's thin effort to create a "conflict" between the Ninth Circuit and the Claims Court suffers from yet another fundamental defect. No such "conflict" can exist: there is no general public law of contracts. There is the law of Nevada, the law of Minnesota, the law of New York, etc., and the law with respect to federal contracts. But the law of Nevada cannot "conflict" with any federal law of public contracts; each government is entirely free to go its own way.[1] And, of course, "the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Volt Information Sciences Inc. v. Board of Trustees of Leland Stanford University*, 109 S.Ct. ____, ____ (1989).[2] Moreover, the Ninth Circuit's "erroneous" views on the Nevada law of public construction contracts poses no conceivable threat of harm to any federal interest. In fashioning federal law, the Claims Court is not bound by the Ninth Circuit's view of the Nevada law on public construction contracts.

B. Notice of Claim Statute

Petitioner concedes (p. 12 n. 7) that Briscoe's original action for declaratory equitable relief was not subject to the Nevada notice-of-claim requirement because it sought only equitable relief. *Hart v. City of Las Vegas*, 73 Nev. 29, 31, 307 P.2d 617, 618 (1957). The Ninth Circuit held that the notice-of-claim statute was not applicable when Briscoe filed a compulsory

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1 See, for example, *Aiken County v. BSP Dev. of Envirotech Corp.*, 866 F.2d 661 (4th Cir. 1989), applying South Carolina law to a suit by a county against a subcontractor supplying a heat treatment system for a waste water treatment plant.

2 Petitioner's premise that there is some "general" law of public works construction is, at bottom, simply an invocation of *Swift v. Tyson*, 16 Pet. 1 (U.S. 1842), a doctrine interred over fifty years ago by this Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

counterclaim-in-reply to the County's counterclaim. (A. pp. 10a-11a) In so holding, the Ninth Circuit relied on *State v. Capital Convalescent Center*, 92 Nev. 147, 547 P.2d 677 (1976), where the Nevada Supreme Court had held that a defendant's failure to comply with an analogous notice statute did not bar it from filing a compulsory counterclaim for damages. The Ninth Circuit rejected the County's attempt to limit *Capital Convalescent Center*, and concluded that "Briscoe's view of Nevada law is the better one." (857 F.2d at 611; A. p. 11a) The Court clearly understood that "the interpretation of Nevada's notice-of-claim statute is a question of state law." (857 F.2d at 610; A. p. 9a)

Even were the Ninth Circuit's view of Nevada law wholly mistaken, that Court's misconstruction involves only an issue of state law and thus no basis for review in this Court. Rule 17.1, *supra*. Petitioner seeks to escape that fact by insisting that the Ninth Circuit's ruling "runs afoul of the constitutional barrier of sovereign immunity." (p. 13) Not a single decision is cited in support of this startling argument. Nor could it be. The constitutional protection for state sovereign immunity has nothing to do with this case. No judgment has been entered against the state, or state officials. For a hundred years it has been settled that the state's sovereign immunity from suit in the federal court does not extend to such subordinate political bodies as counties or municipalities. *Lincoln County v. Luning*, 133 U.S. 529 (1890), long ago held that the eleventh amendment does not bar an individual suit against a county for non-payment of a debt.[3] There is simply nothing in petitioner's belated attempt to transform an ordinary question of the interpretation of state law into an eleventh amendment issue.

Of course, as a matter of its own state substantive law, Nevada can restrict suits against its governmental units by pro-

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3 See also, for example, *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979); *Welch v. Texas Dept. of Highways and Pub. Transp.*, _____ U.S. _____ (1987), 107 S.Ct. 2941, 2953 (plurality opinion).

hibiting them entirely, or, as here, by requiring that litigants comply with certain conditions precedent—such as giving notice of claims—before instituting suit. There is no dispute that the Nevada notice of claim statute must be enforced in a diversity suit. *Felder v. Casey*, 108 S.Ct. 2302, 2313 (1988). The Ninth Circuit understood that clearly, and for that Court the only issue was the meaning of the Nevada statute. The Court's resolution of that issue raises only a matter of Nevada substantive law.

C. Fair Trial

In the court below petitioner argued that error was committed in the jury instructions, by reason of a continuance in the trial, and by use of certain evidentiary rulings. These claims were carefully considered and rejected by the Court of Appeals. (857 F.2d at 611-14; A pp. 11a-20a) Petitioner's efforts to inflate these rulings into a "cumulative" (p. 15) denial of due process is a transparently thin effort to reargue here what was lost below. Moreover, the heavily fact-specific claim that the "cumulative" effect of these "errors" rendered an 87 day trial fundamentally unfair presents no issue for this Court. To repeat *Johnston*, *supra*, this Court "does not grant certiorari to review evidence and discuss specific facts."

CONCLUSION

The petition for certiorari states no ground remotely within Rule 17.1 of the Rules of this Court, and accordingly, the petition should be denied.

Respectfully submitted,

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